



U.S. Department of Justice

Environment and Natural Resources Division

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VIA E-MAIL AND U.S. MAIL FIRST-CLASS

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Michael Callaghan
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Re: *United States and West Virginia Department of Environmental Protection v.
James C. Justice Companies, Inc., and James C. Justice, II,
Civil Action No. 1:15-cv-16018 (S.D. W. Va.)*

Gentlemen:

I write on behalf of the United States Environmental Protection Agency, Region III (“EPA”) regarding the Consent Decree entered in the above-referenced matter on February 25, 2016. As we have previously discussed with you, several of your clients’ obligations under the Decree are overdue. Most notably, the Decree requires an EPA-approved stream restoration plan. As described below, please be advised that EPA will soon approve with conditions the restoration plan that your clients submitted in April 2016.

Background

In my letter dated February 10, 2017, I noted the restoration and mitigation requirements of the Consent Decree,¹ as well as the requirement to record deed restrictions for the restored

¹ Paragraphs 23-26 of the Consent Decree set forth the Justice Defendants’ obligations regarding restoration and mitigation. Pursuant to Paragraph 24, on April 28, 2016, Neely & Callaghan submitted on behalf of the Justice Defendants a document titled “Dam Structure Characterization and Removal Dams 11 Through 20, Turkey Creek (Middle New River Watershed), Monroe County, West Virginia” (“Partial Dam Removal Plan”) authored by Potesta & Associates, Inc. (“Potesta”). EPA, in consultation with the

sites.² At that time, EPA had not received any response to its October 2016 comments on the draft “Partial Dam Removal Plan.” Mr. Callaghan and I spoke by phone shortly after my February 10 letter, and Mr. Callaghan assured me that the Justice Defendants would ensure that Potesta would be adequately funded to continue its work and that the failure to adhere to Consent Decree obligations would be promptly remedied. We appreciated your quick attention to the matter, which enabled Potesta representatives to accompany EPA staff on a February 28, 2017 site visit. EPA observed that at least 16 of the 20 structures have partially failed, resulting in further sedimentation, loss of stream channel, adverse impacts to the biotic community, and the potential for instream temperature change. Following that site visit, however, EPA did not receive a revised restoration plan from Potesta. On July 24, 2017, EPA sent a letter to Potesta and Mr. Callaghan explaining its view that restoration of the stream could be accomplished in a relatively straightforward manner by removing the dams and stabilizing the original stream channel and floodplain. EPA’s letter also explained the key elements that the restoration plan should include. EPA requested that Potesta submit such a plan by August 14, 2017, so that the work could be performed before September 15, 2017, to avoid in-water work during trout spawning season.

EPA has not received a substantive response to either its October 11, 2016 comments or its July 24, 2017 letter. EPA has contacted Potesta to determine the status of a response, and based upon those communications it is EPA’s understanding that Potesta prepared what it regards as an approvable plan, and submitted that plan for review by your clients in early September 2017. However, the document has not been submitted to EPA. I spoke with Mr. Callaghan in early October, and he informed me of Defendants’ desire for EPA to impose a plan. Mr. Callaghan suggested that equipment staged at The Greenbrier could be quickly mobilized to carry out such a plan. While EPA will certainly be receptive to accommodating future opportunities for your clients to accomplish the required work as efficiently as possible, unfortunately dam removal work cannot commence this year due to trout spawning season and the need to perform work in low-water conditions. As outlined below, EPA will soon approve the April 2016 plan with specified conditions, with the work to be completed no later than the end of summer 2018.

Consent Decree Obligations

Defendants have not yet satisfied (1) the restoration and mitigation requirements set forth in Paragraphs 23-26 of the Consent Decree, (2) the deed restriction-related requirements of Paragraph 29 of the Consent Decree, and (3) the written status report requirements of Paragraph 31 of the Consent Decree. Among other potential remedies, such violations are subject to stipulated penalties under the Consent Decree (*see* Paragraphs 46-48). This letter is not a demand for such penalties, and we remain committed to informal resolution of this matter

West Virginia Department of Environmental Protection (“WVDEP”), reviewed the Partial Dam Removal Plan. On October 11, 2016, EPA sent a letter to Ms. Jessica Yeager of Potesta and to Mr. Michael Callaghan providing comments on the Partial Dam Removal Plan and stating that EPA could not approve the Plan because it was incomplete (both because it did not address all twenty dams and because it lacked certain necessary information with regard to certain aspects of restoration, mitigation and post-construction monitoring). EPA’s letter noted that Paragraph 25 of the Consent Decree required a response to EPA’s comments within 60 days.

² Required by Paragraph 29 of the Consent Decree.

through EPA's conditional approval of the April 2016 plan. However, please be aware that the amount of stipulated penalties would be significant in the event that future proceedings to enforce the Decree become necessary. As set forth in the Decree, stipulated penalties accrue daily for each separate violation and begin accruing the day after performance is due or on the day of violation, whichever is applicable. The amounts are \$1,000 per day per violation for the first 30 day, \$2,000 per day per violation for the next 30 days, and \$3,000 per day per violation thereafter. With regard to the failure to submit a restoration plan addressing EPA's October 2016 or July 2017 comments, we consider the plan to have most recently been due by August 31, 2017 (after several EPA-agreed extensions). With regard to the deed restriction requirements, those are more than a year overdue as of the date of this letter (due within 180 days after entry of the Decree (i.e., August 22, 2016)). The written status reports, which have never been submitted, were due on April 4, 2016, October 4, 2016, April 4, 2017, and October 4, 2017.

EPA Conditional Approval of the April 2016 Restoration Plan

In the interest of an informal and efficient resolution, and consistent with your clients' wish for EPA to impose a restoration plan, EPA plans to approve the April 2016 plan with "specified conditions." See Consent Decree ¶ 24. EPA will consult with the West Virginia Department of Environmental Protection, but the approved plan's conditions will likely include, at minimum, terms appropriate to address EPA's October 2016 and July 2017 comments. EPA will most likely require as part of the approved plan that: (1) the Justice Defendants retain an independent third-party professional engineer (i.e., licensed by the West Virginia State Board of Registration for Professional Engineers) to develop detailed specifications, and to evaluate and certify implementation of the plan, (2) the dam removal and restoration work commence in mid-July 2018 and be completed no later than August 15, 2018, and (3) deed restrictions on the relevant portions of the property be recorded within 90 days after the restoration work is certified to EPA as complete. EPA currently anticipates that it will issue its conditional approval of the restoration plan in January 2018. The approved plan will be an enforceable part of the Consent Decree. Consent Decree ¶ 26.

Thank you for your prompt attention to this matter, and please contact me if you have any questions or concerns.

Sincerely,

/s/ Austin D. Saylor
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cc: Stefania D. Shamet, U.S. EPA Region III ORC
Jeremy Bandy, WVDEP
Scott Driver, WVDEP